81-2334

Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
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No. 82-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

Petitioner,

v.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether there should be reviewed by the Court the conflicts between the decisions of the Court of Appeals for the District of Columbia Circuit here for review and the Courts of Appeals for the Ninth and Tenth Circuits respecting the right of Indians to judicial review in water rights litigation of arbitrary and capricious conduct of Respondent Attorney General Smith, acting as a fiduciary, involving an abuse of that officer's litigating discretion, when the arbitrary and capricious conduct involving an abuse of the Attorney General's litigating discretion stems from conflicts of interest which pervade that officer's discretion in Indian water rights litigation.

2. Whether the United States Court and the Court of Appeals erred in declaring that Respondent Attorney General of the United States, acting in a fiduciary capacity, is entitled to absolute immunity from suit in the exercise of alleged litigating discretion, when the Attorney General is charged by Petitioner Tribe with acts in excess of that officer's authority, conflicts of interest and intentional violations of the Tribe's vested property rights constituting bad faith, arbitrary and capricious conduct involving abuses of discretion and causing irreparable and continuing damage to Petitioner Tribe, in a non-monetary action for declaratory judgment and injunctive relief initiated by Petitioner Tribe pursuant to 28 U.S.C. § 1362, arising under the Constitution and laws of the United States; Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, § 702 (1976), § 706; and 28 U.S.C. §§ 2201, *et seq.*

3. Whether the United States District Court and the Court of Appeals erred in declaring that Respondent Secretary of the United States Department of Interior, when acting in a fiduciary capacity, is entitled to absolute immunity from judicial review in the alleged exercise of

non-existent litigating discretion, for whom no claim of immunity was made by Respondents, in an action initiated by Petitioner Tribe charging Respondent Secretary with intentional violations of trust obligations owing to Petitioner Tribe stemming from conflicts of interest, arbitrary and capricious conduct involving abuses of discretion in excess of that officer's authority causing irreparable and continuing damage to Petitioner Tribe through the violation of the Tribe's vested property rights, in a non-monetary action for declaratory and injunctive relief against Respondent Secretary, initiated by Petitioner Tribe pursuant to 28 U.S.C. § 1362, arising under the Constitution and laws of the United States; Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, § 702 (1976), § 706; and 28 U.S.C. §§ 2201, *et seq.*

4. Whether the United States District Court and the Court of Appeals erred in declaring that Respondent Attorney General of the United States and Respondent Secretary of the United States Department of Interior are entitled to absolute immunity from judicial review in the alleged non-existent exercise of litigating discretion when those officers of the Trustee United States are charged with intentional mismanagement, in no sense exercising litigating judgment, of Petitioner Tribe's vested property rights in an action charging those officials with conflicts of interest, arbitrary and capricious conduct involving abuses of discretion in excess of their authority, in a non-monetary action for declaratory and injunctive relief initiated by Petitioner Tribe pursuant to 28 U.S.C. § 1362, arising under the Constitution and laws of the United States; Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, § 702 (1976); § 706; and 28 U.S.C. §§ 2201, *et seq.*

5. Whether there should be reviewed by the Court the decision of the Court of Appeals here for review, which appears to concur with the decisions of the Court of Appeals for the Second Circuit declaring that 5 U.S.C.

§ 702 does not waive the immunity of the United States from suit, which decisions are in conflict with the opinions of the Court of Appeals for the Third Circuit which declare that, in actions of the character here involved seeking non-monetary, declaratory and injunctive relief against federal officials pursuant to congressional enactments granting federal question jurisdiction upon the district courts, the Administrative Procedure Act, 5 U.S.C. § 702 (1976), serves as a waiver of the United States' sovereign immunity.

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STATUTORY PROVISIONS INVOLVED

Administrative Procedure Act

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1362. Indian tribes.

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, *wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.* (Emphasis supplied).

Declaratory Judgments Act

28 U.S.C. § 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner White Mountain Apache Tribe respectfully prays that a Writ of Certiorari issue to review the Judgment and Memorandum of the United States Court of Appeals for the District of Columbia Circuit, entered March 16, 1982, a Petition for Rehearing and a Suggestion for Rehearing *En Banc* having been denied, April 8, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, appears as Appendix A to this Petition. The order of the United States District Court for the District of Columbia, dismissing Petitioner's Complaint, is not reported. (Appendix C to this Petition).

JURISDICTION

The Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit was entered March 16, 1982. A timely Petition for Rehearing with Suggestion that Rehearing be *En Banc* was filed March 26, 1982, and was denied April 8, 1982. This Petition for a Writ of Certiorari is filed within ninety (90) days of that date.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

INTRODUCTION

Parties: Petitioner White Mountain Apache Tribe, Fort Apache Indian Reservation, Whiteriver, Arizona, is a duly organized Indian tribe recognized by the Secretary of Interior in accordance with 25 U.S.C. § 476.[1] Petitioner, on May 22, 1981, filed its Complaint for De-

[1] See, Appendix H to this Petition, Complaint, at p. 27a, for Location Map.

claratory Judgment and for Permanent Injunction, not seeking monetary damages, against Respondents William French Smith, Attorney General of the United States, and James G. Watt, Secretary of the United States Department of the Interior. The action was initiated in the United States District Court for the District of Columbia, Civil No. 81-1205.

Jurisdiction: Pursuant to 28 U.S.C. § 1362, Congress provides that an Indian tribe, in the status of Petitioner, may initiate civil actions involving controversies of the nature here involved arising "under the Constitution, laws, or treaties of the United States."[2] There is a genuine, on-going, irreconcilable conflict of great importance between Petitioner Tribe and Respondents Smith and Watt which comes within the purview of 28 U.S.C. §§ 2201, *et seq.*, the Declaratory Judgments Act.

Petitioner Tribe invoked the jurisdiction of the District Court pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*; 5 U.S.C. § 702 (1976); 5 U.S.C. § 706; and related sections.[3]

Petitioner Tribe seeks declaratory and injunctive relief, not monetary damages, against the illegal and unauthorized conduct of Respondents, who have violated and threaten to continue to violate Petitioner Tribe's constitutional, civil and vested property rights, which are protected by the Due Process provisions of the Constitution.

Petitioner Tribe's Complaint Summarily Dismissed For Alleged Lack Of Subject Matter Jurisdiction:[4] Respond-

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[2] *Ibid.*, at p. 19a. 28 U.S.C. § 1362. See, in that connection, the recently amended 28 U.S.C. § 1331:

"Federal question

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." (1980).

[3] Appendix H to this Petition, Complaint, at pp. 24a and 25a.

[4] Appendix C to this Petition, June 23, 1981 Order dismissing Petitioner Tribe's Complaint, at p. 6a.

ent Attorney General Smith moved to dismiss Petitioner Tribe's Complaint for lack of "jurisdiction over the subject matter of this action."[5] In granting Respondent Smith's Motion to Dismiss, the District Court declared, among other things, that (a) 5 U.S.C. §§ 701, *et seq.*, (b) 28 U.S.C. § 1362, (c) 28 U.S.C. §§ 2201-2202, or (d) any other statute do not confer jurisdiction upon that Court over the Attorney General's exercise of "litigating judgment."[6]

Non-Compliance With Rule 54(b) Of The Federal Rules Of Civil Procedure: Respondent Secretary Watt was not mentioned in Respondent Attorney General Smith's Motion to Dismiss Petitioner Tribe's Complaint. No mention was made of Respondent Secretary Watt in the District Court's Order of Dismissal. Seeking compliance with Federal Rule 54(b), Petitioner Tribe requested an amendment in the Order of Dismissal to include the last-mentioned Respondent.[7] In dismissing only Respondent Attorney General, there remains undisposed of, as reviewed below, the numerous claims asserted by Petitioner Tribe against Respondent Secretary Watt.[8]

Allegations In Petitioner Tribe's Complaint To Be Taken As True: Respecting an order dismissing a complaint against the Attorney General, the Court said this:

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[5] Appendix G to this Petition, at p. 18a, Motion to Dismiss Complaint—only as to Respondent Attorney General, Respondent Secretary of Interior was not included in the Motion.

[6] Appendix C to this Petition, at p. 6a.

[7] Rule 54(b) of the Federal Rules of Civil Procedure requires that, when more than one claim for relief is presented in an action and when multiple parties are involved, the district court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties. That disposition of the matter, however, is limited to situations where the court makes an express determination that there is no just reason for delay and upon express direction for the entry of judgment.

[8] See, Appendices D and E to this Petition at pp. 7a and 8a.

> . . . *if the allegations of the complaints are taken as true* (as they must be on the motions to dismiss), the Executive Order does not authorize the Attorney General [to perform the activities about which Petitioner complains] . . .[9]

In *Scheuer v. Rhodes*,[10] where, as here, a complaint was summarily dismissed by the District Court, the Court declared that the facts, as alleged, must be taken as true. The task of the District Court, under those circumstances, is "necessarily a limited one." [11] The Court then emphasized that a complaint must be construed favorably for the pleader.[12] Those concepts have been applied repeatedly.[13] Moreover, "summary disposition" is disfavored.[14]

A. Bad Faith And Arbitrary And Capricious Conduct, Involving Abuses Of Discretion By Respondents, Stem From Conflicts Of Interest And Preclude Respondents From Proper Performance Of Their Legal Obligations Owing To Petitioner Tribe

Petitioner Tribe asserts that the sovereign immunity of the United States has been waived by 5 U.S.C. §§ 702, *et seq.*, and that it is entitled to declaratory relief pur-

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[9] Joint Anti-Facist Refugee Committee v. McGrath, Attorney General, *et al.*, 341 U.S. 123, 126 (1951). (Original emphasis).

[10] 416 U.S. 232, 236 (1974).

[11] *Ibid.*

[12] *Ibid.*, at p. 238.

[13] Garrett v. Bamford, 538 F.2d 63, 65 (CA 3, 1976), *cert. den.*, 429 U.S. 977 (1976), citing Walker, Inc. v. Food Machinery, 381 U.S. 172, 174-75, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965); Curtis v. Everette, 489 F.2d 516, 518 (3d Cir. 1973), *cert. den. sub. nom.*; Smith v. Curtis, 416 U.S. 995, 94 S.Ct. 2409, 40 L.Ed.2d 774 (1974). See, also, Bell v. Hood, 327 U.S. 678, 682 (1946).

See, 5 *Federal Practice and Procedure*, Wright, Miller & Kane, § 1350, pp. 551-52, and cited authorities; see, Pocket Part during 1981, at p. 112.

[14] Johnsrud v. Carter, 620 F.2d 29, 32 (CA 3, 1980).

suant to 28 U.S.C. §§ 2201, *et seq.*, against both Respondents. Respondents admit to (a) their arbitrary and capricious conduct as it pertains to the administration of Petitioner's Salt River rights, resulting in irreparable and continuing damage to Petitioner Tribe; and (b) Respondent Attorney General Smith's arbitrary and capricious conduct as it pertains to the preparation and prosecution of litigation involving Petitioner Tribe's Salt River rights, resulting in irreparable and continuing damage to Petitioner Tribe and to the Tribe's Salt River rights.[15]

1. ***Specifically, In Its Complaint Seeking Declaratory And Injunctive Relief Against Administrative Violation Of Petitioner's Salt River Rights By Respondents, Petitioner Alleged The Following***

(a) *Subject Matter or Res*

Petitioner Tribe holds full equitable title [16] to Salt River rights sufficient to meet the Tribe's present and future water requirements on the Fort Apache Indian Reservation.[17] Judicial cognizance by the Court in *Winters v. United States* [18] was taken that, in the arid and semi-arid

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[15] See, p. 3, *supra*, "Allegations In Petitioner Tribe's Complaint To Be Taken As True."

[16] See, Appendix H to this Petition, Complaint, at p. 26a, para. I.

[17] The White Mountain Apache Indian Reservation was created by Executive Order issued November 9, 1871, 2 Kappler, 2nd ed., at pp. 810, *et seq.* As stated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138, note 1 (1980), the Congress, by Act of June 7, 1897 (30 Stat. 64), divided the White Mountain Apache Indian Reservation into the Fort Apache Indian Reservation and the San Carlos Indian Reservation.

Congress has recognized title in the White Mountain Apache Tribe in In Re Wilson, 140 U.S. 575, 577 (1892). Title likewise resides in Petitioner Tribe to resources that are part of the Fort Apache Indian Reservation. 29 Op. A.G. 239, 241, *et seq.* (1911), citing In Re Wilson.

[18] 207 U.S. 564, 576 (1908).

West, Indian lands without water are "valueless." In *Arizona v. California*, the *Winters Doctrine* was applied to Indian reservations in Arizona.[19] The Court imputed knowledge to both the Congress and the Executive Branch of the Government that water was "essential" for the Indian people on the arid reservations to meet their present and future water requirements. Those *Winters* rights are measured by the practicably irrigable acreage within the reservation.[20]

(b) *Respondent Agents for Trustee United States*

Respondents admit that they are principal agents of the United States, trustee for the Tribe[21] and are charged with the most "exacting fiduciary standards" in the performance of their responsibilities owing to Petitioner Tribe.[22] Respondents must exercise the highest degree of care, skill and diligence in the performance of those functions and, moreover, must act solely for the benefit of Petitioner Tribe.[23]

(c) *Respondents' Intentional Mismanagement of Tribe's Salt River Rights*

Irreconcilable conflicts of interest pervade all aspects of Respondents' conduct respecting Petitioner Tribe's Salt River rights. Respondents have in the past and are now seeking to diminish, limit, denigrate and violate the Tribe's Salt River rights for the benefit of the Salt River Federal Reclamation Project and the Central Arizona Federal Reclamation Project administered by Respondent

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[19] 373 U.S. 546, 599-601 (1963).

[20] See, Appendix H to this Petition, Complaint, at p. 27a for Location Map.

[21] Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).

[22] Seminole Nation v. United States, 316 U.S. 286, 297 (1893).

[23] See, Appendix H to this Petition, Complaint, at pp. 39a and 40a, paras. XIX and XX.

Secretary Watt.[24] Due to their conflicts of interest, Respondents seek to subvert Petitioner Tribe's Salt River rights to the *Kent Decree* in the Maricopa County Court, State of Arizona. They admit that their predecessors procured the entry of the *Kent Decree* for the benefit of the Salt River Federal Reclamation Project. The *Kent Decree* involves an intentional violation of Indian rights to the use of water by Respondents. The Tribe alleged and is prepared to prove that Respondents Watt and Smith, in a clear abuse of their discretionary powers, as principal agents of the Trustee United States, through arbitrary and capricious conduct, plan to violate Petitioner Tribe's *Winters* rights for the benefit of Salt River Federal Reclamation project. That arbitrary and capricious conduct is a product of Respondents' irreconcilable conflicts of interest.[25]

Respondents' efforts to subvert Petitioner Tribe's rights to the *Kent Decree* and other state court decrees stem from the preference that those officials accord to the federal reclamation projects.[26]

Planned violations by Respondents of the Tribe's Salt River rights stem entirely from intentional mismanagement and in no way pertain to the "litigating judgment" of the Attorney General.

2. *Relief Prayed For By Petitioner Tribe Against Respondents*

Petitioner Tribe seeks declaratory judgment against Respondents establishing as a matter of law that, by rea-

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[24] *Ibid.*, at p. 39a, "Agents Of Trustee Violate Their Obligations To The Tribe"; see, paras. XVIII, *et seq.*; p. 40a, "All Pervasive Conflicts of Interest. . . ."

[25] *Ibid.*

[26] *Ibid.*, at p. 42a, "A Corrupt History: The Salt River Federal Reclamation Project," paras. XXVII, *et seq.*; "Conflicts Of Interest Of The Attorney General—Conclusively Established By Kent Decree," at p. 48a, paras. XXXVI, *et seq.*

son of their conflicts of interest, Respondents cannot properly fulfill their responsibilities as principal agents of the United States, trustee for the Tribe. Respondents will cause irreparable and continuing damage to Petitioner Tribe by the seizure, diminution and violation of the Tribe's Salt River rights, if Petitioner is denied the judicial review that it seeks.[27]

Additionally, Petitioner Tribe seeks relief enjoining both Respondents from taking action which would submit Petitioner Tribe's Salt River rights to the laws of Arizona or to the courts of that State.

Totally ignored by the District Court and the Court of Appeals is the fact that relief was sought by Petitioner Tribe respecting the intentional mismanagement of the Tribe's rights.

B. Declaratory And Injunctive Relief Sought By Petitioner To Preclude Respondent Attorney General From Exercising Arbitrary And Capricious "Litigating Judgment"

It is admitted by Respondent Attorney General Smith [28] that conflicts of interest pervade all aspects of that official's activities involving "litigating judgment" in connection with Petitioner's Salt River rights. Petitioner Tribe repeatedly advised that officer that his conflicts of interest resulted in the Tribe's rejection of any representation by Respondent Attorney General Smith involving the Tribe's Salt River rights.[29]

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[27] *Ibid.*; see, Petitioner Tribe's Prayer for Relief involving administrative violations in no way pertaining to the Attorney General's exercise of "litigating judgment," at p. 62a, paras. 1 & 2.

[28] See, p. 3, *supra*, "Allegations In Petitioner Tribe's Complaint To Be Taken As True."

[29] See, Appendix H to this Petition, Complaint, at p. 26a, para. 1; see, Tribal Resolution; Correspondence between Petitioner Tribe and Attorney General and Solicitor of the Department of Interior, at pp. 36a-38a, note 2, and appendices attached to Appendix H.

Pleaded by Petitioner Tribe and admitted by Respondents is that the agency, which operates the Salt River Project, initiated litigation against Petitioner Tribe.[30] Seeking to defend its Salt River rights against seizure and the subversion of its rights to the *Kent Decree*,[31] Petitioner Tribe removed the proceedings to the federal court and moved to dismiss. Respondents did not join Petitioner in its efforts to protect the Tribe's Salt River rights.[32] The Tribe's motion to dismiss was denied.[33]

The Ninth Circuit reversed the District Court declaring that the state court lacked jurisdiction over Indian water rights by reason of the disclaimer in Arizona's Enabling Act.[34] Hence, it was error to deny Petitioner's Motion to Dismiss the action by Respondent Watt's agent against the Tribe.

There are pending here Petitions to review the opinions of the Ninth Circuit that Indian rights are not subject to the jurisdiction of Arizona state courts by reason of Arizona's Enabling Act.[35]

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[30] *Ibid.*, at p. 59a, para. LVII.

[31] See, p. 7, *supra*.

[32] In re Matter of Determination of Conflicting Rights, 484 F.Supp. 778, 784 (U.S.D.C. D. Ariz. 1980).

[33] *Ibid.* There, the federal district court declared that the proceeding was a "general adjudication" upon grounds subsequently rejected by the Court of Appeals, see, note 34, *infra*. See, Dugan v. Rank, 372 U.S. 609, 618 (1963). See, also, Appendix H to this Petition, at p. 54a, paras. L, *et seq*.

[34] San Carlos Apache Tribe v. Arizona, *et al.*, 669 F.2d 1093 (CA 9, 1982); Northern Cheyenne Tribe v. Adsit, *et al.*, 668 F.2d 1080 (CA 9, 1982). Respecting Arizona's Enabling Act, see, McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 175 (1973).

[35] Arizona, *et al.*, Petitioners v. San Carlos Apache Tribe, Respondents, No. 81-2147, filed May 12, 1982, United States Supreme Court, October Term, 1981; State of Montana, *et al.*, Petitioners v. Northern Cheyenne Tribe, Respondents, No. 81-2188, filed May 21, 1982, United States Supreme Court, October Term, 1981.

Irrespective of the Ninth Circuit's decisions in the *San Carlos* and *Northern Cheyenne* cases, there is an ongoing controversy between Petitioner Tribe and Respondents. Respondents assert that, notwithstanding their bad faith and the arbitrary and capricious conduct, they have the power over Petitioner's objections to make decisions for the purposes of litigation respecting the Tribe's vested rights. Reference in that connection is made to the recent assertion by Respondent Secretary Watt to the Solicitor that, irrespective of the Court of Appeals' decisions in *Northern Cheyenne* and *San Carlos*, Petitioner Tribe's Salt River rights would be adjudicated.[36]

1. *Relief Prayed For By Petitioner Tribe*

Petitioner Tribe seeks a *declaratory judgment* that conflicts of interest, giving rise to an abuse of discretion by the Attorney General, preclude that officer from exercising "litigating judgment."

Additionally, the Tribe seeks injunctive relief that will prohibit Respondent Attorney General from exercising "litigating judgment" in regard to the Tribe's Salt River rights.[37]

As will be reviewed, the "litigating judgment" of Respondent Attorney General Smith was illegally projected to Respondent Secretary Watt irrespective of the fact that the Secretary of Interior has no power whatever to exercise "litigating judgment" under the circumstances.

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[36] See, Appendix I to this Petition, at p. 154a, May 19, 1982 letter from the Office of the Solicitor, Department of Interior, on behalf of Respondent Secretary Watt, advising Petitioner Tribe that the Secretary was demanding data assembled by the Tribe for use in purposes of litigation. It is denied by Petitioner Tribe that Respondent Secretary Watt, in view of the conflicts of interest, may properly make such demands. The data requested by Secretary Watt would be used against the Tribe for the benefit of the federal reclamation projects.

[37] See, pp. 8, *et seq.*, *supra*.

C. Court Of Appeals Affirmed District Court's Order Of Dismissal Ignoring Admissions By Respondents Of Their Conflicts Of Interest And Arbitrary And Capricious Intentional Mismanagement Of Petitioner Tribe's Salt River Rights [38]

The Court of Appeals affirmed the order of the trial court dismissing Petitioner Tribe's Complaint. Ignored by the Court of Appeals is the fact that Petitioner Tribe sought relief against both Respondent Attorney General Smith and Respondent Secretary of Interior Watt.

By its opinion, the Court of Appeals, in plain and serious error, attempted *sua sponte* to amend and reconstruct Petitioner Tribe's verified Complaint.

Ignored by the Court of Appeals are charges in Petitioner's Complaint that (1) Respondents intentionally mismanaged the Tribe's Salt River rights and (2) Respondents have intentionally undertaken to negotiate away, sell, exchange, diminish and denigrate the Tribe's Salt River rights.[39] The Tribe separately prayed for relief against Respondents for their on-going, intentional mismanagement of the Tribe's rights. Those violations by Respondents of Petitioner Tribe's rights are ongoing and in no way involve litigating discretion.

The Court of Appeals made a *de novo* adjudication that Respondent Secretary Watt had vested in him "litigating discretion," which, most assuredly, he does not.[40]

D. Denial Of Petition For Rehearing And Of Petition For Rehearing En Banc

Petitioner Tribe sought a rehearing en banc. That petition was denied by the Court of Appeals.[41]

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[38] See, Appendix A to this Petition, p. 1a.

[39] See, pp. 6, *et seq.*, *supra*.

[40] See, 43 U.S.C. § 1457, which sets forth the powers of the Secretary of Interior and which in no sense relate to litigation.

[41] See, Appendix B to this Petition, at p. 4a.

ARGUMENT

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

CONFLICTS BETWEEN COURT OF APPEALS' DECISION HERE AND COURTS OF APPEALS FOR THE NINTH AND TENTH CIRCUITS AND WITH THE COURT CREATE PRESSING NEED FOR GRANTING TRIBE'S PETITION [42]

Issue Of Transcendent Importance—Rule 17

A review on certiorari is an imperative necessity. As principal agents of the United States, trustee for Petitioner Tribe, Respondents (a) seek to diminish the Tribe's water rights for non-Indian, federal projects and (b) seek to subvert the Tribe's water rights to state jurisdiction.

Corrupt And Intentional Mismanagement Of Salt River Rights By Attorneys General And Secretaries Of Interior Is An Indisputable Fact Concerning Which Petitioner Is Entitled To Judicial Review

From the inceptive moment of the Salt River Federal Reclamation Project, successive Secretaries of Interior and Attorneys General have violated Indian rights for the benefit of that project. The corrupt conduct of the Secretaries of Interior and Attorneys General involve intentional mismanagement of the Tribe's Salt River rights.[43] Congress has reported that—then, as now—

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[42] Rule 17, Supreme Court Rules, "Jurisdiction On Writ Of Certiorari," para. 1:

> "A review on writ of certiorari . . . will be granted only when there are special and important reasons therefor. * * *
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

[43] Appendix H to this Petition, Complaint, at pp. 42, *et seq.*, "A Corrupt History. . . ."

the Indian interests have been "most outrageously intermingled with the affairs of the Reclamation Service. . . ." [44] Stressed there by Congress is the fact that the Interior Department—Bureau of Reclamation—has operated in the "twilight zone" respecting Indian water rights. Congress then added that, if "fraud does not exist . . . the badges of fraud are evident." [45]

Corrupt conduct gave rise to these proceedings by Petitioner Tribe against Respondents for the purpose of protecting its invaluable Salt River rights against seizure by those officials.

Opinion Of Court Of Appeals Here For Review Conflicts Sharply With Opinions Of The Courts Of Appeals For The Ninth And Tenth Circuits

Obligations of Respondents require them to meet the most "exacting fiduciary standards" in preserving and protecting the Tribe's Salt River Rights.[46] By its opinion, the Court of Appeals effectively denied the Tribe's right of judicial review respecting the flagrant misconduct by Respondents. The Court of Appeals denied Petitioner Tribe's right to remedies against violations of the Code of Professional Responsibility. It is declared by the American Bar Association that a lawyer should never represent multiple clients with differing interests in litigation.[47] Respondent Attorney General Smith is immersed in conflicts of interest. That officer's judgment cannot be exercised "solely" for the benefit of Petitioner Tribe.

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[44] *Ibid.*, at pp. 42a, 43a.

[45] *Ibid.*, at p. 43a.

[46] See, p. 6, *supra*. See also, Bogert, *The Law Of Trusts And Trustees*, Rev. 2d ed., 1978, § 543, p. 197, "Trustee's Duty Of Loyalty To Beneficiaries," and cited authorities; see, Vol. 2, Scott, *Law Of Trusts*, "Duties Of The Trustee," § 169, p. 1297; Vol. I, *Restatement Of The Law Of Trusts Second*, § 170, "Duty Of Loyalty."

[47] American Bar Association, Code of Professional Responsibility, EC-1-15.

Neither Respondent should purport to act for Petitioner Tribe because their conduct is submerged in conflicting influences and loyalties proscribed by the Canons of Ethics.[48]

It has been admitted by representatives of the Attorney General that, due to conflicts of interest, their position in Indian water rights litigation is "untenable." [49] It has likewise been admitted that the Secretaries' "inherent conflicts of interest" result in Respondent Watt's asserting rights to the use of water diametrically opposed to Petitioner Tribe's interests in the Salt River.[50]

In a Presidential message to Congress, it has been declared that "No self-respecting law firm" would represent opposing clients in the manner which Respondents purport to represent Petitioner Tribe respecting the Tribe's Salt River rights.[51]

In sharp contrast to the opinion of the Court of Appeals presented here for review, the Court of Appeals for the Tenth Circuit said this to the Attorney General in regard to conflicts between the Secretary of Interior and the Pueblo Indians on the Rio Grande:

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[48] *Ibid.*, at EC-5-1.

[49] Indian Trust Counsel, Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, U.S. Sen., 92nd Cong., 1st Sess., on S.2035, "A Bill To Provide for the Creation of the Indian Trust Counsel Authority, and for Other Purposes," November 22 & 23, 1971, at p. 15.

[50] *Ibid.*, at p. 12.

[51] Federal Protection of Indian Resources, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Sen., 92nd Cong., 1st Sess., On Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, October 19 & 20, 1971, Part 1, pp. 233-34. There, the Secretary of Interior and representatives of the Attorney General candidly admitted to the conflicts of interest between their non-Indian constituents and the Indians for whom they purport to act as agents of the Trustee United States.

> The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel . . . concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos.[52]

Continuing, the Court of Appeals declared that the Attorney General could not adequately represent both interests.[53] Identical concepts have been applied to the Secretary of Interior. Citing the *Aamodt* decision, the Tenth Circuit reviewed the conflicts of interest and declared that "representation" of the Indians "by the United States is not adequate." [54]

In sharp contrast to the opinion here for review, the Ninth Circuit, in its *Northern Cheyenne* decision under the heading "Conflicts of Interest," granted judicial review and declared that where, as here, the Attorney General purports to represent numerous federal agencies and entities, while simultaneously purporting to represent Indian tribes,[55] the representation by the Attorney General is "inadequate." [56]

The *Northern Cheyenne* and *San Carlos* opinions, regarding the issues of conflicts of interest, relative to Re-

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[52] New Mexico v. Aamodt, 537 F.2d 1102, 1106 (CA 10, 1976), *cert. den.*, 429 U.S. 1121 (1977).

[53] *Ibid.*

[54] Manygoats v. Kleppe, 558 F.2d 556 (CA 10, 1977).

[55] *Ibid.*, at p. 558. See, Appendix F to this Petition, at p. 15a, in which the Attorney General and the Secretary of Interior purport to represent seventeen (17) conflicting federal agencies and Indian tribes.

[56] Northern Cheyenne Tribe v. Adsit, *et al.*, 668 F.2d 1080, 1089 (CA 9, 1982), Petition for Certiorari filed May 21, 1982, No. 81-2188; see, also, San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (CA 9, 1982), Petition for Certiorari filed May 12, 1982, No. 81-2147, in which the Court of Appeals for the Ninth Circuit adopted in full the reasoning and analysis found in the Northern Cheyenne decision.

spondents Attorney General Smith and Secretary Watt, are final. They are not presented to this Court for review in the petitions for certiorari filed by the States of Arizona and Montana.[57] Thus, the Tribe's petition for judicial review respecting the improprieties of Respondents' conduct is ripe for review.

In the *Memorandum And Report On Preliminary Issues*[58] in the case of *Arizona v. California*, the conflicts of interest of the Attorney General are extensively reviewed.[59] Judge Tuttle cites *Trbovich v. United Mine Workers*,[60] and sets forth the following quotation:

> Even if the Secretary [of Labor] is performing his duties, broadly conceived, the union member may have a valid complaint about the performance of 'his lawyer.'[61]

In affirming the dismissal of Petitioner Tribe's Complaint for lack of subject matter jurisdiction,[62] the Court of Appeals for the District of Columbia Circuit is sharply at variance with the opinions of the Courts of Appeals for the Ninth and Tenth Circuits, and Special Master Tuttle in *Arizona v. California*, in which the Courts granted the Indian tribes there involved the right to judicial review respecting the conflicts of interest of the Attorney General and Secretary of Interior, which must preclude Respondents from representing the tribes in regard to water rights, all as prayed for here by the Tribe.

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[57] See, pp. 10, *et seq.*, *supra*.

[58] See, Report, filed August 28, 1979, Elbert P. Tuttle, Special Master, State of Arizona, Plaintiff v. State of California, *et al.*, Defendants, United States of America, Intervenor.

[59] *Ibid.*, at pp. 10, *et seq.*

[60] 404 U.S. 528 (1972).

[61] *Ibid.*, at p. 539.

[62] See, Appendix A to this Petition at p. 1a.

Court Of Appeals For The District Of Columbia Circuit Violates Criteria For Reviewability Established By This Court

In *Rusk v. Cort*, the Court held that only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.[63]

In *Abbott Laboratories v. Gardner*, the Court reiterated that concept.[64] As contemplated by the Administrative Procedure Act, 5 U.S.C. § 701, the Court declared that the principle of "nonreviewability" is "not lightly to be inferred." [65] The Court emphasized that ". . . judicial review of . . . administrative action is the rule, and nonreviewability an exception. . . ." [66] There resides with Respondent Attorney General Smith the burden of demonstrating congressional intent to preclude judicial review in regard to Petitioner Tribe's verified Complaint.[67]

In *Scheuer v. Rhodes*, the Court explicitly ruled that the complaint is to be "construed favorably to the pleader." [68] The Court admonished that dismissal "for lack of subject matter jurisdiction" without an answer, "necessarily" limits the Courts' tasks to the facts admitted in the complaint.[69]

In *Barlow*, the Court stressed that "slight beneficiary indicia" will establish the right of a complainant to judi-

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[63] 369 U.S. 367, 379-80 (1962).

[64] 387 U.S. 136, 141 (1967).

[65] Barlow v. Collins, 397 U.S. 159, 166 (1970). See, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).

[66] Barlow v. Collins, 397 U.S. 159, 174 (1970).

[67] *Ibid.*

[68] 416 U.S. 232, 234-37 (1974).

[69] *Ibid.*, at p. 236.

cial review and "thus to reach the merits." [70] It is pointed out in *Barlow* that a different course would "commit the action wholly to agency discretion," as has been experienced by Petitioner Tribe by the conduct of the District Court and the Court of Appeals.[71]

1. *Respondent Secretary Watt's Conduct Is Subject To "Judicial Review"*

Intentional mismanagement by Respondent Watt of the Tribe's Salt River rights is extensively charged in Petitioner's Complaint and admitted by the Attorney General's Motion to Dismiss.[72]

In *Morton v. Ruiz*,[73] the Court reviewed the Secretarial obligations to Indian tribes. Reference was made to the fact that the Secretary of Interior had presented no reasons for failing to meet the requirements of the Administrative Procedure Act.[74] In securing to the Indians the right to judicial review, the Court declared that:

> The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.[75]

The courts below clearly violate the concepts of *Ruiz*, stripping from Petitioner Tribe the right to have its day in court.

In *Morton v. Mancari*,[76] the Court stressed the need for the Secretary properly to perform his responsibilities. In

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[70] Barlow v. Collins, 397 U.S. 159, 175-76 (1970).

[71] *Ibid.*, at p. 175, note 9.

[72] See, pp. 6, *et seq.*, *supra*; see, also, p. 3, *supra*, "Allegations In Petitioner Tribe's Complaint To Be Taken As True."

[73] 415 U.S. 199 (1974).

[74] *Ibid.*, at p. 235.

[75] *Ibid.*, at p. 236.

[76] 417 U.S. 535 (1974).

denying Petitioner Tribe its right to judicial review, the Court of Appeals has acted in sharp contrast with other courts of appeals and with decisions of the Supreme Court.[77]

Over the protests of the Attorney General, the Court of Appeals for the Ninth Circuit declared that Secretarial discretion to allocate electricity is subject to judicial review.[78] In rejecting the contentions that the Secretarial power was not subject to judicial review pursuant to 5 U.S.C. § 702, the Ninth Circuit established the principle upon which it would conduct its judicial analysis and stressed that:

> . . . judicial reviewability of administrative action is the rule, and nonreviewability an exception which must be demonstrated. . . .[79]

To demonstrate the preclusion of judicial review there must be a showing of " 'clear and convincing evidence' of a legislative intent to restrict judicial review." [80] The Ninth Circuit cited *Citizens To Preserve Overton Park v. Volpe*.[81] The Court declared that the exception of "discretion" committed to an agency pursuant to the Administrative Procedure Act "is a very narrow one." [82] The Ninth Circuit emphasized that the exceptions to judicial review are limited to those rare instances where statutes are drawn in such broad terms that, in the given case,

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[77] See, Ickes v. Fox, 300 U.S. 82, 96 (1937).

[78] Arizona Power Pooling Association v. Morton, 527 F.2d 721 (CA 9, 1975), *cert. den.*, 424 U.S. 911 (1976).

[79] *Ibid.*, at p. 727.

[80] See, p. 17, *supra*, Barlow v. Collins, Abbott Laboratories v. Gardner and other cited decisions.

[81] 401 U.S. 402 (1971).

[82] Arizona Power Pooling Association v. Morton, 527 F.2d 721, 727 (CA 9, 1975), *cert. den.*, 424 U.S. 911 (1976).

"there is no law to apply." [83] That circumstance does not prevail here.

In *Santa Clara v. Andrus*,[84] the Court of Appeals declared that administrative action taken in violation of statutory authority is of no force and effect. There has been acceptance of that principle on numerous occasions, including but not limited to the Court's decision in *Ickes v. Fox*.[85]

In *Diamond Ring Ranch, Inc. v. Morton*,[86] the Court of Appeals for the Tenth Circuit rejected the contention that Secretarial authority under the Taylor Grazing Act is so broad that it actually "precludes judicial review" of the Secretary of Interior's actions. In rejecting that contention, the Court of Appeals declared:

> There is a presumption of reviewability for those agency actions that are alleged to be erroneous.[87]

Congressional enactments conferring upon the district courts jurisdiction over actions initiated by Indian tribes, which actions arise under the Constitution, laws and treaties of the United States, when read in conjunction with the Declaratory Judgments Act and the Administrative Procedure Act, 5 U.S.C. §§ 701(2), *et seq.*, underscore the errors committed by the District Court and the Court of Appeals.

2. *Intentional, Arbitrary And Capricious Conduct Of Respondent Attorney General Cannot Be Shrouded By Absolute Immunity From Judicial Review*

Intentional mismanagement of Petitioner's Salt River rights is admitted by Respondents. Litigating discretion of

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[83] *Ibid.*

[84] 572 F.2d 660 (CA 9, 1978), *cert. den.*, 439 U.S. 859 (1978).

[85] 300 U.S. 82 (1937).

[86] 531 F.2d 1397, 42 A.L.R. Fed. 336, 350 (CA 10, 1976).

[87] *Ibid.*, at p. 1406, note 7.

either Respondent is in no sense involved.[88] Erroneous concepts, contrary to fact and law, were adopted by the District Court [89] and, without a citation of authority and in plain and serious error affirmed by the Court of Appeals.[90]

In *Brownell, Attorney General, v. Tom We Shung*,[91] the Court held that an alien was entitled to judicial review in the federal district court challenging the "discretion" of the Attorney General. In declaring that a denial of judicial review was counter to the concepts of the Administrative Procedure Act, it was established that the Attorney General's discretion is not entitled to absolute immunity from judicial review.

The Court, in its *Accardi* decision, granted judicial review affording a petitioner the opportunity to prove his allegations against a discretionary determination by the Board of Immigration Appeals.[92]

Judicial review of an Attorney General's decision involving the Voting Rights Act of 1965 was granted.[93]

Contrary to its present decision, the Court of Appeals for the District of Columbia Circuit declared that there was no merit to the Attorney General's position that, "even when legally erroneous," that officer's determinations are immune from judicial review.[94] In its rejection of the Attorney General's claimed absolute immunity, the Court of Appeals, in *Levi*, cited *Abbott Laboratories*,

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[88] See, Appendix G to this Petition, at p. 18a.

[89] See, Appendix C to this Petition, at p. 6a.

[90] See, Appendix A to this Petition, at p. 1a.

[91] 352 U.S. 180 (1956).

[92] Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[93] Harper v. Levi, Attorney General, 527 F.2d 53 (D.C. App. 1975).

[94] *Ibid.*

Barlow and *Brownell*,[95] declaring that the courts should not "restrict access to judicial review" absent clear and convincing evidence of a congressional intent to the contrary.[96]

In *Adams v. Richardson*,[97] contrary to its position here, the Court of Appeals for the District of Columbia Circuit reviewed extensively the courts' right to review alleged discretionary conduct. The Court stressed that the "discretionary exception" in the Administrative Procedure Act is a narrow one.[98] The Court rejected the assertions by the Attorney General that "the exercise of prosecutorial discretion by the Attorney General or by United States Atorneys" are beyond judicial review.[99] The Court of Appeals further rejected the argument declaring that the cases there relied upon by the Attorney General do not support the claim to "*absolute*" immunity from judicial review of the Attorney General's prosecutorial discretion.[100]

In reviewing the conduct of the Attorney General in *Joint Anti-Facist Refugee Committee v. McGrath, Attorney General*,[101] the Court stressed the obvious that there can be no "arbitrary fiat" in this Nation because it is implicit that the Government of the United States is

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[95] See, pp. 17, *et seq.*, *supra*.

[96] Harper v. Levi, Attorney General, 527 F.2d 53, 67 (D.C. App. 1975).

[97] 480 F.2d 1159 (D.C. App. 1973).

[98] *Ibid.*, at p. 1161.

[99] *Ibid.*, at p. 1162.

[100] *Ibid.* (Original emphasis). See, Vol. 43, Opinions, Attorney General, No. 19, March 30, 1979, citing Adams v. Richardson respecting "the exercise of discretion" by officials in the Executive Branch of the Government.

[101] 341 U.S. 126 (1951).

one of laws and not of men.[102] The Court rejected the contention that the "Attorney General has" power to "delegate to himself" the power to act arbitrarily.[103] To say that Respondent Attorney General Smith is above the law is entirely contrary to the concepts expressed in *Butz v. Economou*, in which the Court declared that:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.[104]

Here, the Court of Appeals, in error, declared that Respondent Attorney General Smith's "litigating judgment" and non-litigating judgment may be exercised by him in defiance of the law. In plain and serious error, the District Court and the Court of Appeals further projected that absolute immunity from judicial review to Respondent Secretary Watt. Most assuredly, there is no law to support the conclusions by the courts below—none was or can be cited.

Absolute Immunity From Judicial Review Cannot Be Used To Conceal Arbitrary And Capricious Conduct Of Respondent Attorney General Smith

Judicial review of the Attorney General's litigating judgment in the sensitive area of taking private property by eminent domain has been recognized where bad faith is charged.[105] Citing *Carmack* and numerous decisions, the Ninth Circuit declared that, where arbitrary, capricious or bad faith conduct is charged in condemnation

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[102] *Ibid.*, at p. 136.

[103] *Ibid.*, at p. 138.

[104] 438 U.S. 478, 506 (1978).

[105] United States v. Carmack, 329 U.S. 230, 243-44 (1946).

proceedings, judicial review is available.[106] That Court likewise added that judicial review of administrative exercise of condemning authority may well be required by the Administrative Procedure Act.[107]

Set forth immediately above are the precepts of the law that govern the review by the courts of the Attorney General's conduct. Stressed there is the fact that declaratory and injunctive relief of the character sought here by Petitioner Tribe against the arbitrary and capricious conduct of the Attorney General is not barred by absolute immunity. In explicit terms, Petitioner Tribe has pleaded and Respondent Attorney General Smith has admitted that his "litigating judgment" is pervaded with conflicts of interest in regard to Petitioner Tribe's Salt River rights.[108]

A careful analysis of the law as it exists today reveals a rejection of the concepts asserted by Respondent Attorney General Smith and adopted by the District Court and the Court of Appeals relative to "absolute immunity from judicial review" of the Attorney General's litigating judgment. Indeed, in *Adams v. Richardson*, the Court of Appeals for the District of Columbia Circuit declared that it does not adhere to the concept of *absolute* immunity of the Attorney General's prosecutorial discretion.[109]

It has been authoritatively declared that in recent years there has been a sharp modification in regard to the immunity of "prosecutorial discretion." [110] The change in judicial rationale is emphasized in the Court's *Marshall*

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[106] Southern Pacific Land Co. v. United States, 367 F.2d 161, 162 (CA 9, 1966).

[107] 5 U.S.C. §§ 701, *et seq.*

[108] See, pp. 4, *et seq.*, *supra.*

[109] See, p. 22, *supra.*

[110] Davis, *Administrative Law Treatise*, 1982 Supplement, ch. 9, "Enforcement Discretion," § 9:2, at pp. 190-91.

v. Jerrico Inc. decision.[111] On the subject, the last-cited authority declares that:

> The Supreme Court has decisively opened the door to judicial review, for abuse of discretion, of decisions to prosecute.[112]

That concept is evidenced by the decision of *Trbovich v. United Mine Workers of America, et al.*[113] There, it was held that union members could reject representation by the Secretary of Labor as their "lawyer." [114]

Commenting on the assertions by the Attorney General for the Secretary of Labor, that the decisions of the Secretary were immune from judicial review, the Court said this:

> The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical.[115]

The disparate interests of the Secretary of Labor subjected the Secretary's litigating discretion to review of the character denied to Petitioner Tribe here. As stressed throughout, the Attorney General has the "duty to serve two distinct interests"; indeed, seventeen distinct interests.[116] Judicial review of that grave impropriety by the Attorney General should ensue.

In *Adams v. Richardson* [117] and Attorney General's Opinion,[118] the Court of Appeals for the District of

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[111] 446 U.S. 238, 249-50 (1980).

[112] Davis, *Administrative Law Treatise*, 1982 Supplement, at p. 192.

[113] 404 U.S. 528 (1972). See, p. 16, *supra*, *Memorandum And Report Of Preliminary Issues*, Arizona v. California, Report of Special Master, Judge Elbert P. Tuttle, at pp. 17, *et seq.*

[114] 404 U.S. 528, 539 (1972).

[115] *Ibid.*, at p. 538.

[116] *Ibid.* See, Appendix F to this Petition, at p. 16a.

[117] See, p. 22, *supra*.

[118] See, p. 22, note 100, *supra*.

Columbia Circuit affirmed the District Court's order requiring the Secretary of Health, Education, and Welfare to exercise "prosecutorial discretion" to enforce the enactments adopted by Congress. In *Dunlop v. Bachowski*, the prosecutorial discretion of the Secretary of Labor was held to be subject to judicial review.[119]

In denying Petitioner Tribe the right to be heard, the Court of Appeals, as emphasized,[120] undertook to constrict the relief sought by Petitioner involving intentional mismanagement of the Tribe's property for the benefit of federal reclamation projects constructed and administered by Respondent Secretary of Interior who, throughout the entire period, has acted in close concert with Respondent Attorney General Smith. Very much a part of the intentional mismanagement of the Tribe's Salt River rights was the effort of Respondent Attorney General Smith, over the repeated protests of Petitioner Tribe, to force the Tribe and its rights into the Maricopa County Court of the State of Arizona.[121]

It is important here that neither the District Court nor the Court of Appeals for the District of Columbia could cite or did cite any authority in declaring that the Tribe should not be heard in regard to its charges of conflicts of interest, partaking of bad faith, and arbitrary and capricious conduct, involving abuse of discretion, all as provided for in the Administrative Procedure Act relied upon by Petitioner Tribe.

The ruling of the court below declaring the Tribe may not have judicial review respecting the arbitrary and capricious conduct of Respondent Smith violating and threatening to violate Petitioner Tribe's Salt River right is "deeply unsound." [122]

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[119] 421 U.S. 560 (1975).

[120] See, p. 13, at para. C, *supra*.

[121] See, pp. 11, *et seq.*, *supra*.

[122] Davis, *Administrative Law Treatise*, 1982 Supplement, ch. 9, pp. 197, *et seq.*

The effort to force upon Petitioner Tribe the rejected and unwanted representation of Respondent Attorney General Smith is an on-going controversy, irrespective of the *Northern Cheyenne* and *San Carlos* decisions, which are here on petitions for certiorari.[123] Both Respondents assert, as against Petitioner Tribe, that they are empowered in the exercise of "litigating judgment" of the Attorney General to take the Tribe and its Salt River rights into litigation, notwithstanding the fact that the conduct of both officials is encompassed within irreconcilable conflicts of interest giving rise to bad faith and arbitrary and capricious conduct.[124] That indisputable fact and the intentional mismanagement of the Tribe's Salt River rights, which have nothing to do with litigating judgment, reveal the pressing necessity for the writ prayed for here by Petitioner Tribe.

There Are Conflicts Among The Decisions Of The Court Of Appeals Here For Review, The Courts Of Appeals For The Second Circuit, And Third Circuit

In dismissing both Respondents for lack of subject matter jurisdiction, the Court of Appeals for the District of Columbia Circuit, in effect, declared that those officers were protected in their arbitrary and capricious conduct by the concept of sovereign immunity from suit. There can be no other justification for that opinion. In so holding, the Court of Appeals is sharply at variance with the principles enunciated in *Johnsrud v. Carter, President.*[125] In reversing a district court's order of dismissal for lack of subject matter jurisdiction, the Third Circuit quoted the Administrative Procedure Act, 5 U.S.C. § 702 and declared that:

> . . . in an equitable action . . . seeking 'non-statutory' review of agency action, the Administrative Proce-

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[123] See, Appendix I to this Petition, at p. 154a.

[124] See, pp. 13, *et seq., supra.*

[125] 620 F.2d 29, 30 (CA 3, 1980).

> dure Act specifically 5 U.S.C. § 702 (1976), serves as a waiver of the United States' sovereign immunity.[126]

In its decision, the Court of Appeals for the Third Circuit referred to its earlier decision in *Jaffee*.[127] The Third Circuit stressed that *Jaffee* and *Johnsrud* were in conflict with the decision of *Watson v. Blumenthal* rendered by the Second Circuit.[128] Respecting *Watson v. Blumenthal*, the Court of Appeals for the Third Circuit declared: "We are constrained to disagree with the Second Circuit. . . ." [129]

In *Watson v. Blumenthal*, the Second Circuit declared that the 1976 amendment of the Administrative Procedure Act [130] did not remove the defense of sovereign immunity in actions brought under the "federal question jurisdiction statute." In arriving at its conclusion, the Second Circuit cited *Califano v. Sanders*,[131] which, it has been stated, is rendered moot by the 1976 amendment to 5 U.S.C. § 702.

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[126] *Ibid.*, at p. 31. See, Helstokski v. Goldstein, 552 F.2d 564 (CA 3, 1977). See, also, Hill v. United States, 571 F.2d 1098, 1102 (CA 9, 1978).

[127] Jaffee v. United States, 593 F.2d 712, 718 (CA 3, 1978), *cert. den.*, 441 U.S. 961 (1979).

[128] 586 F.2d 925, 932 (CA 2, 1978).

[129] Jaffee v. United States, 593 F.2d 712, 718 (CA 3, 1978), *cert. den.*, 411 U.S. 961 (1979). See, Jaffee v. United States, 663 F.2d 1226 (CA 3, 1981). There, the Court of Appeals declared:

> "In view of existence of alternative remedy under Veterans' Benefits Act and effect of suits on military effectiveness, former soldier and wife did not have cause of action directly under Constitution. . . ."

[130] 5 U.S.C. § 702.

[131] 430 U.S. 99, 105 (1977). See, Vol. 14, *Federal Practice And Procedure*, 1981 Pocket Part, § 3655, at p. 27.

In *Doe v. Civiletti, Attorney General of the United States*,[132] the Court of Appeals for the Second Circuit reiterated the proposition expressed in *Watson v. Blumenthal* and declared that 5 U.S.C. § 702 does not serve as a waiver of sovereign immunity for the United States in cases arising under the federal question jurisdiction statute, 28 U.S.C. § 1331, which uses the same language as 28 U.S.C. § 1362, invoked by Petitioner Tribe in this proceeding.

It is apparent that the Court of Appeals for the District of Columbia Circuit has joined the Second Circuit in its interpretation of the language of 5 U.S.C. § 702 in denying that the 1976 amendment to that Act waives the sovereign immunity of the United States from suit in cases arising under the Constitution, laws and treaties of the United States, the language of 28 U.S.C. § 1362 invoked here. On the subject, there has been declared that:

> The courts are split on the question of whether Section 702 as amended waives sovereign immunity in actions seeking equitable relief under Section 1331 of Title 28.[133]

Similar to 28 U.S.C. § 1331, 28 U.S.C. § 1362 confers upon the United States district courts jurisdiction for Indian actions arising under "the Constitution, laws, or treaties of the United States."

The Court of Appeals for the District of Columbia Circuit ignored the mandate of Congress when it waived the immunity of the United States from suit in non-monetary proceedings arising under the Constitution and laws of the United States. It is plain and serious error to deny Petitioner Tribe its rights to judicial review

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[132] Doe v. Civiletti, United States Attorney General, 635 F.2d 88 (CA 2, 1980).

[133] Vol. 14, *Federal Practice And Procedure*, Wright, Miller & Cooper, 1981 Pocket Part, § 3655, "Actions Against Federal Agencies and Officers," at p. 24.

respecting intentional mismanagement of the Tribe's Salt River rights for the benefit of the non-Indian projects and purposes, all as alleged by the Tribe and admitted here.[134]

CONCLUSION

In denying Petitioner White Mountain Apache Tribe judicial review of Respondents' unauthorized and illegal conduct, the Court of Appeals for the District of Columbia Circuit departs from the basic concepts enunciated by the Court in *Ex Parte Young*[135] and the long line of decisions that followed it. Ignored completely by the dismissal of the Tribe's Complaint and the affirmance of that dismissal is the Court's caveat in *Butz v. Economou*[136] that no officer of the National Government may act in defiance of the law. Not only did the Court of Appeals depart from established principles of law by its affirmance of the District Court's dismissal of Petitioner Tribe's verified Complaint, but its opinion provides judicial approval of Respondent Secretary Watt's and Respondent Attorney General Smith's intentional mismanagement of Petitioner Tribe's Salt River rights.

Accordingly, predicated upon the plain and serious errors of the Court of Appeals, Petitioner White Mountain Apache Tribe respectfully prays the granting of its Petition for a Writ of Certiorari.

Respectfully submitted,

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[134] See, pp. 14, *et seq.*, *supra*.

[135] 209 U.S. 123, 143 (1908).

[136] 438 U.S. 478, 496-504 (1978).